Supreme Court, U.S.
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No. 95-914

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

EDITH HOROWITZ BROIDA,

Petitioner,

v.

ESTATE OF MAURICE HOROWITZ, Through Its Personal Representative, Samuel S. Smith, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER THE RULING OF THE DISTRICT COURT DISMISSING THE PETITIONER'S CAUSE DUE TO LACK OF DIVERSITY OF CITIZENSHIP BETWEEN THE PLAINTIFF AND THE DEFENDANTS WAS CLEARLY ERRONEOUS.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

The Honorable C. Clyde Atkins, Trial Judge

The Honorable Ted Bandstra, Magistrate Judge

Edith Broida, Petitioner.

Saul Broida, as Trustee for Thomas Blaine Merrett, Respondent.

Alvin Edward Horowitz, Respondent.

Karen Horowitz Kaplan, Respondent.

Paula Horowitz, assignee of Stephen R. Horowitz, Respondent.

Stephen R. Horowitz, Respondent.

Milton Kelner, guardian-ad-litem and counsel for guardian-ad-litem, Respondent.

Stacie Merrett, Respondent.

Thomas Blaine Merrett, Respondent.

Betsy H. Nieves, Respondent.

Gene S. Rosen, Respondent, and counsel for himself and Stacie Broida Merrett and Thomas Blaine Merrett.

Paula Horowitz Roth, Respondent.

Samuel S. Smith, individually and as personal representative of the Estate of Maurice Horowitz, Respondent.

Bernard B. Weksler, counsel for Respondents Alvin Edward Horowitz, Paula Horowitz Roth, Stephen R. Horowitz, Betsy H. Nieves and Karen Horowitz Kaplan.

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OPINIONS BELOW

The opinions below are unreported. The order of the United States District Court for the Southern District of Florida dismissing the Petitioner's action was issued on June 7, 1993 in case 92-997 Civ.-Atkins. This order can be found on pages 3 and 4 of the Petitioner's Appendix to the Petition for a Writ of Certiorari. The opinion of the United States Court of Appeals for the Eleventh Circuit affirming the District Court's dismissal of the Petitioner's action was issued on April 27, 1994, and can be found on Page 2 of the Petitioner's Appendix to the Petition for a Writ of Certiorari. The Eleventh Circuit denied the Petitioner's Petition for Rehearing on August 10, 1995, and this order can be found on page 1 of the Petitioner's Appendix to the Petition for a Writ of Certiorari.

JURISDICTIONAL STATEMENT

The Petition falls within the Court's jurisdiction to review final decisions of the federal courts of appeal by certiorari. 28 U.S.C. § 1254(1). The Eleventh Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 pertaining to review of a final decision by a United States District Court.

STATEMENT OF THE CASE

The Respondent has been presented with the unenviable task of formulating a response to an utterly absurd, incoherent, and improper Petition. Lost amid the rhetoric of the Petition is the real issue at hand, which has been properly ruled upon by the District Court, and affirmed by the Eleventh Circuit. Stated succinctly, the Petitioner's case was dismissed because she failed to sustain her burden of establishing complete diversity of citizenship between herself and the Defendants. A review of the facts and the caselaw on this issue will show that the decisions of the lower courts on this issue were correct, and that this Petition should be denied.

Those portions of the Petition which appear to address issues other subject matter jurisdiction can only be characterized as irrelevant conspiracy theories, and do not merit a response. Even if these issues merited a response, they are presented by the Petition in such an unfocused and confusing manner that the Respondent is unable to discern what these other issues are. (Petition p. i-iv). Thus, while the Petition seemingly presents five separate questions to the court, the Respondent

will only address the single issue of subject matter jurisdiction as it relates to diversity of citizenship.

This proceeding commenced upon Ms. Broida's filing of a Complaint against the Estate of Maurice Horowitz, the personal representative, Samuel S. Smith, the distributees and their counsel seeking the payment of claims allegedly due and owing to Ms. Broida from that estate. (Petitioner's Appendix p. 6-7). That estate had been fully administered and discharged in the Eleventh Judicial Circuit Court in and for Dade County, Florida. (Petitioner's Appendix p. 6). Ms. Broida unsuccessfully appealed the Final Judgment in probate to the Third District Court of Appeal, the Florida Supreme Court and United States Supreme Court.

Ms. Broida alleged that the District Court had subject matter jurisdiction due to the diversity of the citizenship between the plaintiff and the defendants, and federal question jurisdiction for alleged civil rights violations of 42 U.S.C. § 1983. (Petitioner's Appendix p. 7).

Defendants Samuel S. Smith, individually and as personal representative, Gene S. Rosen, Karen H. Kaplan, and Betsy H. Nieves, moved to dismiss Ms. Broida's complaint. (Petitioner's Appendix p. 7).

Mr. Smith alleged that the court lacked subject matter jurisdiction because there was no diversity of citizenship between plaintiff and defendants. (Petitioner's Appendix p. 7). Mr. Smith asserted that at the commencement of this action that plaintiff was a citizen of the State of Florida rather than of the District of Columbia as she claimed. (Petitioner's Appendix p. 7). Mr. Smith also argued that plaintiff failed to state a claim for civil rights violations arising under 42 U.S.C. § 1983, and therefore, there was no federal question jurisdiction. (Petitioner's Appendix p. 7-8).

By order dated June 29, 1992, these motions to dismiss were referred to the United States Magistrate Judge Ted E. Bandstra by the Honorable C. Clyde Atkins pursuant to 28 U.S.C. § 636 (b). (Petitioner's Appendix p. 7). After limited discovery, extensive motions and memorandums, primarily by Ms. Broida, Magistrate Judge Bandstra issued a report and recommendation determining that Ms. Broida was a citizen of Florida at the time of the commencement of the action, and therefore, there was no diversity of jurisdiction. (Petitioner's Appendix p. 5-18). Magistrate Judge Bandstra also determined that the plaintiff had failed to state the claim under 42 U.S.C. § 1983, and therefore, there was

no federal question jurisdiction. (Petitioner's Appendix p. 15-17). The magistrate judge recommended that the motion to dismiss be granted. (Petitioner's Appendix p. 17). Ms. Broida objected to the report and recommendation. (Petitioner's Appendix p. 4). Upon review, The Honorable C. Clyde Atkins entered an order adopting the report and recommendation, granting Defendants' motions to dismiss. (Petitioner's Appendix p. 3-4). In the appeal before the Eleventh Circuit, Ms. Broida did not challenged the determination that she failed to state a claim under 42 U.S.C. § 1983.

In an unpublished opinion dated April 27, 1995, the United States Court of Appeals for the Eleventh Circuit affirmed the ruling of the District Court. (Petitioner's Appendix p. 2).

REASONS FOR DENYING THE WRIT

I. **THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE RULING OF THE DISTRICT COURT DISMISSING THE PETITIONER'S CAUSE DUE TO LACK OF DIVERSITY OF CITIZENSHIP BETWEEN THE PLAINTIFF AND THE DEFENDANTS WAS NOT CLEARLY ERRONEOUS.**

Magistrate Judge Bandstra found that Ms. Broida failed to sustain her burden of proving complete diversity of citizenship. *Hawes v. Club Ecuestre El Comandante*, 598 F.2d 698, 702 (1st Cir. 1979). That determination must be affirmed unless clearly erroneous. *Galva Foundry Company v. Heiden*, 924 F.2d 729 (7th Cir. 1991); *Lew v. Moss*, 797 F.2d 747, 750 (9th Cir. 1986); *Scoggins v. Pollock*, 727 F.2d 1025, 1027 (11th Cir. 1984).

The decision of the district court was not clearly erroneous. By her own admission, Ms. Broida was domiciled in Florida until December 4, 1987. (Petitioner's Appendix p. 12-13) On that date the Petitioner allegedly "declared" that she was a citizen of Washington D.C. (Petitioner's Appendix p. 12). The Petitioner made this declaration while residing in Florida. (Petitioner's Appendix p. 12). Based primarily on this "declaration", the Petitioner contends that she was a citizen of

Washington D.C. when this action was commenced on May 1, 1992. (Petitioner's Appendix p. 6, 12-13). In order for subject matter jurisdiction to conferred by the District Court under 28 U.S.C. §1332(a)(1), complete diversity of citizenship between the Plaintiff and the Defendants must exist when the action was filed. *Smith v. Sperling*, 77 S.Ct. 1112, 1114, 354 U.S. 91, 93 (1957). Thus, the only inquiry is whether her declaration, made on December 4, 1987 while she was physically present in Florida, effected a change in her domicile. The answer to that question is clearly in the negative.

A change in domicile requires the confluence of physical presence at the new location with an intention to remain their indefinitely. *Scoggins v. Pollock*, 727 F.2d 1025, 1026 (11th Cir. 1984). Ms. Broida met neither requirement. Ms. Broida has stated that she was physically present in Florida, except for brief occasional visits to Washington, since 1977 and through the commencement of this proceeding. (Petitioner's Appendix p. 11-13). When Ms. Broida "declared" her domicile to be Washington, D.C. on December 4, 1987 she was not present in Washington D.C. with the intention to remain their indefinitely. Therefore, Ms. Broida did not effectively change her domicile. The order

of the district court is not clearly erroneous and was properly affirmed by the Eleventh Circuit.

II. A WRIT OF CERTIORARI SHOULD NOT BE GRANTED WHEN THE PURPORTED ERROR BELOW CONSISTS OF AN ALLEGEDLY ERRONEOUS FACTUAL FINDING.

According to the rules of the Supreme Court, a petition for a writ of certiorari is rarely granted when the asserted error consists of an allegedly erroneous factual finding by a lower court. Sup. Ct. R. 10 (1995). The determination at issue in this appeal is whether the Petitioner was domiciled in Florida or Washington D.C. when she filed the action in the United States District Court for the Southern District of Florida on May 1, 1992. A determination pertaining to domicile is essentially factual in nature. *Lew v. Moss*, 797 F2d 747, 750 (9th Cir. 1986). A District Court's factual findings on jurisdictional issues must be accepted unless clearly erroneous. *Reebok Intern. Ltd. v. McLaughlin*, 49 F.3d 1387, 1390 (9th Cir. 1995). While the Petitioner no doubt disagrees with the factual determination made below, review of such a determination on certiorari is inappropriate.

III. A WRIT OF CERTIORARI SHOULD NOT BE GRANTED WHEN THE ASSERTED ERROR BELOW CONSISTS OF THE PURPORTED MISAPPLICATION OF A PROPERLY STATED RULE OF LAW.

According to the Rules of the Supreme Court, a petition for a writ of certiorari is rarely granted when the asserted error consists of the purported misapplication of a properly stated rule of law. Sup. Ct. R. 10 (1995). The rule of law at issue in this appeal is clear: the District Courts of the United States lack subject matter jurisdiction over a dispute where there is not complete diversity of citizenship between the Plaintiffs and the Defendants. 28 U.S.C. § 1332(a)(1); *Owen Equipment & Erection Co. v. Kroger,* 98 S.Ct. 2396, 2403, 437 U.S. 365, 373, 57 L.Ed.2d 274 (1978). The District Court properly stated this rule of law in its order ratifying the determination of the Magistrate. (Petitioner's Appendix p. 9). The Eleventh Circuit properly stated this rule of law in its opinion affirming the ruling of the District Court. (Petitioner's Appendix p. 2). While the Petitioner believes that this rule of law has been improperly applied to her, she does not dispute that complete diversity of citizenship is a prerequisite to the proper exercise of subject matter jurisdiction by

the District Court. (Petition p. 8) Under such circumstances, review on certiorari is inappropriate.

IV. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE QUESTIONS PRESENTED FOR REVIEW ARE VERBOSE, INCOHERENT, ARGUMENTATIVE AND REPETITIVE.

Even a cursory review of the questions presented in the Petition demonstrate that they are plainly violative of the Supreme Court rule which requires that such questions be expressed concisely, and that they not be argumentative or repetitive. Sup. Ct. R. 14.1(a) (1995). The questions presented in the petition are not tailored in a manner amenable to reasoned and coherent discourse, and determining what issues are raised by these questions, much less formulating an appropriate response to the questions, is nearly impossible. Having violated Supreme Court Rule 14.1(a), review on certiorari should be denied.

V. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE IT FAILS TO PRESENT WITH ACCURACY, BREVITY, AND CLARITY MATTERS ESSENTIAL TO READY AND ADEQUATE UNDERSTANDING OF THE POINTS REQUIRING CONSIDERATION.

The instant Petition is a long and tedious diatribe which fails to properly focus on the real issue at hand - whether there was complete

diverisity of citizenship when the current action was filed. Instead of focusing on the District Court's subject matter jurisdiction, the Petition attempts to have this Court re-address issues which have already been decided by state circuit courts, state appellate courts, Florida's Supreme Court, the United States Supreme Court, the United States District Court, and the United States Court of Appeals over the course of the sixteen years of litigation pursued by the Petitioner. The opinion of the Eleventh Circuit Court of Appeals addresses the lack of subject matter jurisdiction, and no other issue. The Rules of the Supreme Court require that a petition for a writ of certiorari present with accuracy, brevity and clarity whatever is essential to ready and adequate understanding of the points requiring consideration. Sup. Ct. R. 14.4 (1995). Instead of focusing on the essential issues, the Petitioner has raised, in an incoherent and conclusory fashion, numerous points which neither merit nor require this Court's consideration.

Additionally, the Petitioner's unreasonable attitude toward the judicial process is well documented. The pursuit of frivolous claims and personal attacks on lawyers and judges caused her to be suspended from

the practice of law by the Supreme Court of Florida in 1991. *The Florida Bar v. Broida*, 574 So.2d 83 (Fla. 1991).

CONCLUSION

For all of the reasons mentioned above, the Respondent, Samuel S. Smith, repectfully requests that this Court deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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